90-1014

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

ROBERT E. LEE, ET AL.,
Petitioners,

v.

DANIEL WEISMAN, ETC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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December 21, 1990

QUESTIONS PRESENTED

1. Do school authorities violate the Establishment Clause by allowing a speaker at a public junior high or high school graduation ceremony to offer an invocation and a benediction that acknowledge a diety?

2. Whether direct or indirect government coercion is a necessary element of an Establishment Clause violation?

THE PARTIES

1. The petitioners in this case, who were the appellants in the court of appeals, are Robert E. Lee, individually and as principal of Nathan Bishop Middle School of Providence, Rhode Island; Thomas Mezzanotte, individually and as principal of Classical High School of Providence, Rhode Island; Joseph Almagno, individually and as superintendent of the Providence School Department; and Vincent McWilliams, Robert DeRobbio, Mary Bastastini, Albert Lepore, Roosevelt Benton, Mary Smith, Anthony Caprio, Bruce Sundlun, and Roberto Gonzalez, individually and as members of the Providence School Committee.

2. The respondent in this case, who was the appellee in the court of appeals, is Daniel Weisman, personally and as next friend of Deborah Weisman.

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Petitioners respectfully pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is not yet reported, but is reproduced in the appendix at App. 1a.

The opinion of the United States District Court for the District of Rhode Island is reported at 728 F. Supp. 68, and is reproduced in the appendix at App. 18a.

JURISDICTION

The opinion of the United States Court of Appeals for the First Circuit was entered on July 23, 1990. No petitions for rehearing were filed. On October 19, 1990, Justice Souter extended the time for filing this petition to and including December 21, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Establishment Clause of the First Amendment to the United States Constitution, which provides: "Congress shall make no law respecting an establishment of religion."

STATEMENT OF THE CASE

A. The Graduation Ceremony

For many years the Providence School Committee and Superintendent have permitted school principals to include invocations and benedictions delivered by clergy of various faiths in the graduation ceremonies of the city's public junior high and high schools. App. 19a. The schools provide the clergy with guidelines for the ceremonies prepared by the National Conference of Christians and Jews, which stress inclusiveness and sensitivity in authoring nonsectarian prayer for public civic ceremonies. App. 19a.

Respondent Daniel Weisman's daughter, Deborah, was graduated from Nathan Bishop Middle School, a public junior high school in Providence, in June 1989. App. 19a. Rabbi Leslie Gutterman of the Temple Beth El of Providence performed the invocation and benediction at the ceremony. App. 19a.

Four days before the ceremony, respondent sought a temporary restraining order to prevent the inclusion of invocations and benedictions in the graduation ceremonies of the Providence public junior high and high schools.[1] App. 19a. The district court denied the motion the day before the ceremony, due to lack of time to consider it adequately before the scheduled event. App. 19a-20a.

On June 20, 1989, Deborah Weisman and her family attended the scheduled graduation ceremony at Bishop Middle School. App. 20a. Rabbi Gutterman's invocation addressed a deity at the beginning, and concluded with "Amen."[2] App. 20a. The benediction opened with a reference to God, asked God's blessing, gave thanks to the Lord, and concluded with "Amen."[3] The district court characterized both the invocation and the

1 Respondents invoked the jurisdiction of the district court under 28 U.S.C. 1331, 1343, 2201, and 2202, as well as the court's pendent and ancillary jurisdiction.

2 The invocation, in its entirety, read as follows:

God of the Free, Hope of the Brave:

Footnote continued on next page

benediction as "examples of elegant simplicity, thoughtful content, and sincere citizenship." App. 20a.

Deborah Weisman entered Classical High School in Providence in September 1989, and she has continued to attend that school since then. In July 1989, respondent filed an amended complaint in this action, seeking a permanent injunction against invocations and benedictions in future graduation ceremonies of the Providence public junior high and high schools. App.

Footnote continued from previous page

> For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.
>
> For the liberty of America, we thank You. May these new graduates grow up to guard it.
>
> For the political process of America in which all its citizens may participate, for its court system where all can seek justice we thank You. May those we honor this morning always turn to it in trust.
>
> For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.
>
> May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.
>
> AMEN

App. 20a.

3 The benediction, in its entirety, read as follows:

> O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.
>
> Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them.
>
> The graduates now need strength and guidance for the future. Help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.
>
> We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion.
>
> AMEN

App. 20a-21a.

21a. The district court ruled in favor of respondent and granted the requested relief.

B. The District Court Decision

The district court's Establishment Clause analysis, which the court of appeals majority characterized as "sound and pellucid" and adopted as its own, App. 2a, opened with the observation that under this Court's precedents "God has been ruled out of public education as an instrument of inspiration or consolation" because of "the perceived sensitive nature of the school environment and the apprehended effect of state-led religious activity on young, impressionable minds." App. 21a-22a. The district court determined that the invocation and benediction failed under the second prong of the three-prong test established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The practice impermissibly advanced religion "by creating an identification of school with a deity." App. 24a. According to the district court, "the Providence School Committee ha[d] in effect endorsed religion in general by authorizing an appeal to a deity in public school graduation ceremonies." App. 25a. The district court did not reach the other inquiries under *Lemon* — whether the practice had a secular purpose and whether it fostered an excessive entanglement with religion.

The district court expressly declined to follow the Sixth Circuit's reasoning in *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987), which held that nondenominational invocations and benedictions in public school graduation ceremonies are not *per se* unconstitutional. The *Stein* court had relied upon *Marsh v. Chambers*, 463 U.S. 783 (1983), in which this Court rejected an Establishment Clause challenge to the Nebraska legislature's practice of opening each day's session with a prayer offered by a paid chaplain. The district court here, however, concluded that the "*Marsh* holding was narrowly limited to the unique situation of legislative prayer." App. 27a. As proof of this point, the district court noted that *Marsh* was the only case since 1971 in which the Court did not apply the *Lemon* test. The district court also noted that application of the *Marsh* analysis in the context of graduation invocations and benedictions would result in courts "reviewing the content of prayers to judicially approve what are acceptable invocations to a deity." App. 27a.

Finally, the district court made clear that Rabbi Gutterman's invocation and benediction were unconstitutional solely because they made reference to a deity:

> [N]othing in this decision prevents a cleric of any denomination or anyone else from giving a secular inspirational message at the opening and closing of the graduation ceremonies. Counsel for plaintiff conceded at argument, as she must, that if Rabbi Gutterman had given the exact same invocation as he delivered at the Bishop Middle School on June 20, 1989 with one change — God would be left out — the Establishment Clause would not be implicated.

App. 28a. To punctuate the point, the court recast a new version of Rabbi Gutterman's invocation, one cleansed of its reference to God and, thus, of its perceived constitutional infirmity. App. 28a.[4]

C. The Court of Appeals Decision

A majority of the Court of Appeals for the First Circuit affirmed, over a dissenting opinion by Judge Campbell. The panel majority simply endorsed the district court's opinion and did not elaborate further. App. 2a.

Judge Bownes concurred separately, concluding that the invocation and benediction violated all three prongs of the *Lemon* test. Noting that "[a] graduation ceremony does not need a prayer to solemnize it," Judge Bownes concluded that the primary purpose of the practice is religious. App. 9a-10a. Judge Bownes also believed that the practice fostered an excessive entanglement with religion by virtue of the School Committee's policies of providing guidelines for the composition of nondenominational invocations and of permitting school authorities to select the speakers. App. 10a-11a.

Judge Bownes also found this Court's decision in *Marsh* inapposite. *Marsh*, according to Judge Bownes, "was based on the 'unique' and specific historical argument that the framers did not find legislative prayers offensive to the Constitution because the First Congress approved of legislative

4 The district court made no secret of its discomfort with the result of its ruling:

> The fact is that an unacceptably high number of citizens who are undergoing difficult times in this country are children and young people. School-sponsored prayer might provide hope to sustain them, and principles to guide them in the difficult choices they confront today. But the Constitution as the Supreme Court views it does not permit it . . . . Those who are anti-prayer thus have been deemed the victors. That is the difficult but obligatory choice this Court makes today.

App. 29a.

prayers." App. 11a. *Marsh* did not apply here "since free public schools were virtually nonexistent at the time the Constitution was adopted." App. 11a, quoting *Edwards v. Aquillard*, 482 U.S. 578, 583 n.4 (1987). Thus, Judge Bownes rejected the Sixth Circuit's analysis in *Stein*, and also criticized that court's "troubling" inquiry into the nondenominational content of the challenged invocation. App. 12a. Finally, Judge Bownes stated that the Establishment Clause would have been offended by Rabbi Gutterman's invocation and benediction even if cleansed of their references to a deity. Noting that invocations and benedictions "are by their very terms prayers and religious," Judge Bownes concluded that the practice "offends the First Amendment even if the words of the invocation or benediction are somehow manipulated so that a deity is not mentioned." App. 13a.

In dissent, Judge Campbell believed that "*Marsh* and *Stein* provide a reasonable basis for a rule allowing invocations and benedictions on public, ceremonial occasions," so long as school authorities take care to invite speakers representing a wide range of religious beliefs and nonreligious ethical philosophies. App. 16a.

REASONS FOR GRANTING THE WRIT

This case starkly presents a conflict in the circuits over the proper application of, and interrelationship between, two of this Court's most important Establishment Clause precedents — *Lemon* and *Marsh*. The courts below viewed any official ceremonial reference to a deity as an endorsement of religion, conveying a "tacit preference" for religion in violation of this Court's teaching in *Lemon*. At the same time, the courts below dismissed *Marsh* as a narrow exception to *Lemon*, extending only to official religious practices, such as legislative prayer, that were well known and broadly accepted when the First Amendment was framed in 1791 — an exception inapplicable here because the origins of public schooling in this country can be traced back only a century and a half. The courts in this case thus adopted an understanding of *Marsh* directly at odds with that of the Sixth Circuit in *Stein*, which viewed nondenominational invocations at public school graduation ceremonies as analogous to the legislative prayers upheld in *Marsh*.

The scope and importance of the ruling in this case is enormous, going far beyond the abrupt termination in the states of the First Circuit of a venerable tradition practiced in public school graduation ceremonies throughout the country and expressly approved in the Sixth Circuit. Under

the Court of Appeals' ruling, it is clear that all references to a deity must be cleansed from public school graduation ceremonies. For example, recitation of the Pledge of Allegiance would be forbidden. Similarly, commencement speakers will have to take care to avoid references to a deity in their remarks to graduates. The Reverend Martin Luther King's well-known commencement address to the 1961 graduating class of Lincoln University could not, consistent with the rulings below, be delivered at the 1991 graduation ceremony of a Providence public high school.[5]

The startling proposition that the familiar tradition of invocations and benedictions must be expelled from one of those rare and solemn gatherings by which young people collectively mark an important passage in their lives — and thus contemplate the purposes of their lives — is reason enough for this Court to take up the issue decided in this case. But the reasoning of the courts below cannot be confined to public school graduation ceremonies. The invocation and benediction at issue in this case are but a single and unremarkable manifestation of the long-standing and broad tradition of official acknowledgment of religious values in the public life of the nation. If the courts below have correctly stated the law, then a staggering variety of ceremonial and familiar practices in our public life must be censored to exclude forbidden references to the deity, just as the district court below revised Rabbi Gutterman's invocation. Such a result is contrary to the the teachings of this Court, is in conflict with other lower court decisions, and is, ultimately, at war with the values enshrined in the Religion Clauses of the First Amendment.

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5 King's speech contained a number of references to the deity, including the following observation:

> Black supremacy is as dangerous as white supremacy, and God is not interested in merely in the freedom of black men and brown men and yellow men. God is interested in the freedom of the whole human race and in the creation of a society where all men can live together as brothers, where every man will respect the dignity and the worth of human personality.

King concluded his commencement address with the same stirring words later made famous in his "I Have A Dream" speech delivered from the steps of the Lincoln Memorial on August 28, 1963:

> That will be the day when all of God's children, black men and white men, Jews and Gentiles, Catholic and Protestants, will be able to join hands and sing in the words of the old Negro spiritual "Free at last! Free at last! Thank God Almighty we are free at last!"

I CEREMONIAL ACKNOWLEDGMENTS OF RELIGION DO NOT VIOLATE THE ESTABLISHMENT CLAUSE

A. As this Court recognized in *Marsh v. Chambers*, our Nation has a long tradition of ceremonial acknowledgments of religion. From its inception, the Congress has begun its legislative sessions with an invocation by a paid chaplain. 463 U.S. at 787-88. *See also Lynch v. Donnelly*, 465 U.S. 668, 673-74 (1984). The same practice has been followed in state legislatures across this land, *Marsh*, 463 U.S. at 788-89. The practice was also followed by the Continental Congress from its inception in 1774. *Id.* at 786-87.

This Court itself, and the lower Federal courts, have long opened their daily proceedings with the invocation "God save the United States and this Honorable Court." *Id.* at 786. George Washington, in his first inaugural address, also sought the blessings of God, "that Almighty Being," and "the Great Author of every public and private good." G. Washington, First Inaugural Address, in 1 *Messages and Papers of the Presidents* 44 (J. Richardson ed. 1897). At the conclusion of Washington's inaugural, the new President and both Houses of Congress attended a religious service conducted by the first Episcopal bishop of New York at St. Paul's Chapel in New York City, in accordance with a joint Congressional resolution providing for the service. *See* A. Stokes & L. Pfeffer, *Church and State in the United States* 87 (Rev. 1st ed. 1964). Presidents to this day have continued to make references to God at public events. The inauguration of President Bush included an invocation and a benediction by the Reverend Billy Graham, and a prayer by President Bush himself. 135 Cong. Rec. S67 (daily ed. Jan. 20, 1989).[6]

At this nation's birth, the Declaration of Independence appealed "to the Supreme Judge of the world" and to "the laws of nature and of nature's

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6 The invocation offered by Rev. Graham read,

> Our Father and our God, Thou hast said blessed is the nation whose God is the Lord.
> We recognize on this historic occasion that we are a nation under God.
> This faith in God is our foundation and our heritage . . . .
> * * * * * * *
> We acknowledge thy divine help in the selection of our leadership each 4 years.

County of Allegheny v. American Civil Liberties Union, 109 S. Ct. 3086, 3142 n.9 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

God." It also proclaimed that all men "are endowed by their Creator with certain inalienable rights," and relied on "the protection of Divine Providence." The day after proposing the First Amendment, Congress called on President Washington to proclaim "a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favours of Almighty God." *Lynch*, 465 U.S. at 675 n.2. The President responded by proclaiming November 26, 1789, as a day of thanksgiving in which to offer "our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions." *Id.* Virtually every President since Washington has similarly proclaimed a national day of prayer and thanksgiving.[7] Today Thanksgiving is a national holiday, as is Christmas, despite the fact that "[Thanksgiving] has not lost its theme of expressing thanks for Divine aid any more than has Christmas lost its religious significance." *Id.* at 675 (footnote omitted).

Other official acknowledgments of religion abound. The legend "In God We Trust" has been inscribed on our nation's currency since 1865, 31 U.S.C. 5112(d)(1), and was made the national motto in 1956. 36 U.S.C. 186. In 1950, Congress designated Memorial Day as a day of "prayer for a permanent peace." 36 U.S.C. 169g. In 1952, Congress directed the President to proclaim a National Day of Prayer each year "on which [day] the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals." 36 U.S.C. 169h. The Pledge of Allegiance to the flag was revised by Congress in 1954 to describe the United States as "one nation under God," 36 U.S.C. 172, and this Pledge is recited numerous times each year by school children across the country. *Lynch*, 465 U.S. at 676. Presidential proclamations and messages have issued to commemorate Jewish Heritage Week, Proclamation No. 4844, 46 Fed. Reg. 25077 (1981), and the Jewish High Holy Days, 17 Weekly Comp.

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7 *Lynch*, 465 U.S. at 675 n.2; 3 A. Stokes, *Church and State in the United States*, 180-93 (1950). In his 1944 Thanksgiving Day Proclamation, President Roosevelt said:

> [I]t is fitting that we give thanks with special fervor to our Heavenly Father . . . .
> * * * *
> To the end that we may bear more earnest witness to our gratitude to Almighty God, I suggest a nationwide reading of the Holy Scriptures during the period from Thanksgiving Day to Christmas.

Proclamation No. 2629, 9 Fed. Reg. 13099 (1944). President Reagan and his immediate predecessors have issued similar Proclamations. *Lynch*, 465 U.S. at 675 n.3.

Pres. Doc. 1058 (Sept. 29, 1981). *See also Lynch*, 465 U.S. at 677. On February 3, 1983, in response to a Congressional resolution, S.J. Res. 165, Pub. L. No. 97-280, 96 Stat. 1211 (1982), the President proclaimed 1983 to be the "Year of the Bible." Proclamation No. 5018, 48 Fed. Reg. 5527 (1983). Many patriotic songs, including the National Anthem, 36 U.S.C. 170, "God Bless America," the "Battle Hymn of the Republic," and "America," acknowledge God and invoke His blessings.

Such official acknowledgements of God are not limited to the federal government, of course. At least forty-five of the fifty states and the Commonwealth of Puerto Rico express gratitude to, or otherwise make reference to, a deity or Supreme Being in their constitutions.[8] Virtually all of these state constitutions also have provisions which offer substantially the same protections against the establishment of religion as the United States Constitution.

This same tradition has been followed for 200 years in lesser ceremonies all across this nation, including school graduation ceremonies. For example, at least as early as May 31, 1804, at the first graduation ceremony of one of the nation's first public universities — the University of Georgia — the Reverend Mr. Marshall offered an invocation, and the Reverend Hope Hull concluded the proceedings with a prayer. A. Hull, *A Historical Sketch of the University of Georgia*, 17-19 (1894); *Augusta [Ga] Chronicle*, June 23, 1804. Indeed, the academic ceremonies of graduation, dating back before the founding of our country, are largely drawn from religious ceremonies. DuPuy, *Religion, Graduation and the First Amendment, A Threat or a Shadow*, 35 Drake L. Rev. 323, 358 (1985-1986). The classic graduation ceremony drawn from ancient rites is said to consist "primarily of an *invocation*, a commencement address, the awarding of earned degrees, the awarding of honorary degrees and *the benediction*. K. Sheard, *Academic Heraldry in America* 71 (1962) (emphasis added). In-

8 The Constitution of the State of Rhode Island and Providence Plantations is fairly typical in this regard. The Preamble to the Constitution provides:

> We, the people of the State of Rhode Island and Providence Plantations, grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and to transmit the same, unimpaired, to succeeding generations, do ordain and establish this Constitution of government.

R.I. Const. preamble.

deed, in *Stein*, Judge Milburn observed that the courts "can take judicial notice that invocations and benedictions at public school commencements have been a traditional practice since the beginning of public schools in this country." 822 F.2d at 1410 (Milburn, J., concurring).

B. Graduation invocations and benedictions are just one small part of this long and broad national tradition of ceremonial acknowledgments of religion, a tradition reflecting the simple truth that Americans "are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clausen*, 343 U.S. 306, 313 (1952). As this Court made clear in *Marsh*, 463 U.S. at 790, the validity under the Establishment Clause of the ceremonial practice at issue here must be viewed in the context of this historical tradition. *See also Lynch*, 465 U.S. at 671-78; *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086, 3121 (1989) (O'Connor, J., concurring in part and concurring in the judgment), 109 S. Ct. at 3142 (Kennedy, J., concurring in the judgment in part and dissenting in part).

In prohibiting any reference to a deity in public school graduation ceremonies, the lower courts in this case did precisely what this Court has expressly and repeatedly declined to do: construed the Establishment Clause "with a literalness that would undermine the ultimate constitutional objective as illuminated by history." *Walz v. Tax Comm'n*, 397 U.S. 664, 671 (1970). Both the court of appeals majority and the district court equated reference to a deity with endorsement of religion. Because "reference to a deity necessarily implicates religion," the courts below believed that it was a "forgone conclusion" that the "Providence School Committee ha[d] in effect endorsed religion in general by authorizing an appeal to a deity in public school graduation ceremonies." App. 25a.[9]

Given this reasoning, it is hard to see how any of the official ceremonial acknowledgements of religion discussed above, no matter how venerable or familiar, could survive under the courts' rulings in this case. Indeed, the analysis of the courts below gives point to this Court's warning in *Lynch* that "[f]ocus[ing] exclusively on the religious component of any activity [will] inevitably lead to its invalidation under the Establishment Clause." 465 U.S. at 680.

9 Circuit Judge Bownes, in a concurring opinion, also concluded that "it is self-evident that a prayer given by a religious person chosen by public school teachers communicates a message of government endorsement of religion." App. 10a.

This Court has unequivocally rejected such an extreme view.[10] Ceremonial acknowledgments of religion that merely accommmodate and respect the existing religious beliefs of the people do not constitute an endorsement of religion, nor do they have a primary purpose of advancing religion.[11] Justice O'Connor put it well in her concurring opinion in *Lynch*, 465 U.S. at 692-93:

> [S]uch governmental "acknowledgments" of religion as legislative prayer of the type approved in *Marsh v. Chambers*, . . . government declaration of Thanksgiving as a public holiday, printing of "In God We Trust" on coins, and opening court sessions with "God Save the United States and this Honorable Court" . . . serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those

10 *See, e.g., Marsh*, 463 U.S. at 792 (legislative prayer is not a violation of the Establishment Clause; "it is simply a tolerable acknowledgment of beliefs widely held among the people of this country"); *Lynch*, 465 U.S. at 673 ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."); *Walz*, 397 U.S. at 669 ("The course of constitutional neutrality in this area cannot be absolutely straightline; rigidity could well defeat the basic purpose of these proivisions"); *Zorach*, 343 U.S. at 312-314 ("we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence").

11 See *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring) (the "endorsement test does not preclude government from acknowledging religion or from taking religion into account"); *County of Allegheny*, 109 S. Ct. at 3121 (O'Connor, J., concurring in part and concurring in the judgment) ("Clearly, the government can *acknowledge* the role of religion in our society in numerous ways that do not amount to an endorsement.") (emphasis in original); 109 S. Ct. at 3135, 3138 (Kennedy, J., concurring in the judgment in part and dissenting in part) (government accommodation and acknowledgment of the role religion and religious symbols play in our society is permitted under the Establishment Clause); *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327, 334-38 (1987) (accommodating religion through exemptions from broader government policies does not have an impermissible primary purpose or effect of advancing religion). *See also*, McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 22 (1985) ("Government respect for, and encouragement of, religion in general — in ways that do not compel religious exercise or invade the religious liberty of others — were considered appropriate and even necessary.").

> practices are not understood as conveying government approval of particular religious beliefs.

The *Lynch* Court looked to the long standing national tradition of official acknowledgments of religion to uphold the inclusion of a creche in a government-sponsored Christmas season display. *Lynch*, 465 U.S. at 675-78.[12] The extreme doctrine pronounced by the courts in this case simply cannot be squared with *Lynch*.

Nor can the rulings below be squared with this Court's holding in *Marsh* that legislative prayer "is not . . . an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." 463 U.S. at 792. The courts below evaded *Marsh* by dismissing it as a narrow exception to *Lemon* for official religious practices, such as legislative prayer, that were common in 1791 and were specifically approved by the First Congress.[13] Thus, because public education did not become part of our accepted traditions until the mid-19th century, the *Marsh* case, according to the courts below, is inapposite here.

The *Marsh* opinion itself refutes the interpretation that the courts below placed upon it. The *Marsh* majority stated: "[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress — their actions reveal their intent." 463 U.S. at 790. Thus, the fact that the First Congress itself provided for a paid chaplain to open its sessions with prayer not only reveals that the framers of the Establishment Clause likely did not intend the Clause to forbid that specific practice; it also provides broader insight into what the First Congress intended the words "an establishment of religion" to mean. *See County of Allegheny*, 109 S. Ct. at 3142 (Kennedy, J., concurring in the judgment in part and dissenting in part). In other words, the history surrounding the framing of the Establishment Clause (or any other constitu-

12 See *also Walz*, 397 U.S. 664, 677 (1978), where the Court upheld tax exemptions for churches based in part on the long history of such exemptions.

13 A similar view of *Marsh* was taken by the Eleventh Circuit in *Jager v. Douglas County School District*, 862 F.2d 824 (11th Cir.), *cert. denied*, 109 S. Ct. 2431 (1989). *Jager* involved an Establishment Clause challenge to invocations at public high school football games. The Eleventh Circuit struck down the practice, distinguishing *Marsh* on the ground that "invocations at school-sponsored football games were nonexistent when the Constitution was adopted." *Id.* at 829.

tional provision) has both a retail and a wholesale significance. And any interpretation of the Clause faithful to its intended meaning "must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion." *Id.*[14] The contrary view advanced in this case by the courts below is on the order of saying that the Fourth Amendment does not reach electronic surveillance, that the Commerce Clause does not embrace interstate motor carriage, or that the First Amendment does not extend to the electronic media.

C. In contrast to the decisions below, the Sixth Circuit in *Stein v. Plainwell Community Schools*, 822 F.2d 1406, 1409 (6th Cir. 1987),[15]

14 Contrary to Judge Bownes' suggestion, App. 11a, this Court did not reach a contrary conclusion in *Edwards v. Aguillard*, 482 U.S. 583 n.4. After noting that legislative prayer was upheld in *Marsh* on the basis of "historical acceptance of the practice," the *Edwards* Court stated: "Such a historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted." *Id.* This observation means only that because public education did not exist at the time of the Founding, there can be no historical acceptance of a practice relating to public education that would support the constitutionality of the practice. The observation in *Edwards* surely does not stand for the remarkable proposition that the constitutional history surrounding practices common in 1791 is without significance to the resolution of constitutional challenges to closely analogous innovations in 1991.

In addition, it seems doubtful that the courts below would find that the historical circumstances surrounding the framing of the Establishment Clause limit the practices *prohibited* by the Clause in the same manner that the courts below believe those historical circumstances to limit the practices *permitted* under the Clause. In other words, the courts below no doubt would agree that the First Amendment *prohibits* modern methods of establishing a religion no less than it prohibits ancient ones.

15 The conflict in the lower courts on the validity of graduation invocations and benedictions is not limited to *Stein* and the instant case. A number of other federal and statecourts have considered the issue, and their conclusions have been mixed. Cases upholding graduation invocations and similar practices are: *Grossberg v. Deusebio*, 380 F. Supp. 285, 289 (E.D. Va. 1974); *Wood v. Mt. Lebanon Township School Dist.*, 342 F. Supp. 1293, 1294-1295 (W.D. Pa. 1972); *Wiest v. Mt. Lebanon School Dist.*, 457 Pa. 166, 320 A.2d 362, 365-366, *cert. denied*, 419 U.S 967 (1974); *Sands v. Morongo Unified School Dist.*, 262 Cal. Rptr. 452, 459 (Cal. App.), *review granted*, 264 Cal. Rptr. 683 (Cal. 1989). *See also Florey v. Sioux Falls School Dist.*, 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980) (upholding school board rules outlining school activities during Christmas assemblies); *Brandon v. Board of Ed.*, 635 F.2d 971, 979 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981), *reh'g denied*, 455 U.S. 983 (1982) ("where a clergyman briefly appears at a yearly high school graduation ceremony, no image of official state approval is created"); *Bogen v. Doty*, 598 F.2d 1110, 1111 (8th Cir. 1979) (upholding invocations at meetings of county board); *Lincoln v. Page*, 109 N.H. 30, 241 A.2d 799 (1968) (upholding invocations at town meetings)

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relied upon *Marsh* in upholding nondenominational[16] invocations and benedictions at public school graduation ceremonies:

> The annual graduation exercises here are analogous to the legislative and judicial sessions referred to in *Marsh* and should be governed by the same principles. The invocation and benediction at a graduation ceremony serves the "solemnizing" function described by Justice O'Connor in her concurrence in *Lynch* . . . .[17]

The *Stein* court also distinguished this Court's decisions prohibiting public classroom prayer, stressing that there is "less opportunity for religious indoctrination or peer pressure" in the context of a graduation ceremony. 822 F.2d at 1409. The public nature of the graduation ceremony and the presence of parents provides the young graduates with adequate protection against any type of coercive religious influence. The *Stein* court also noted that "the graduation context does not implicate the special nature of the teacher-student relationship — a relationship that focuses on the transmission of knowledge and values by an authority figure." *Id.*

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; *Anderson v. Salt Lake City Corporation*, 475 F.2d 29, 34 (10th Cir.), *cert. denied*, 414 U.S. 879 (1973) (upholding posting of Ten Commandments in public building saying "The wholesome neutrality guaranteed by the Establishment and Free Exercise Clauses does not dictate obliteration of all our religious traditions."); *Opinion of the Justice*, 108 N.H. 97, 228 A.2d 161 (1967) (decided that bill requiring the posting of "In God We Trust" in public school classrooms would be constitutional).

Cases invalidating graduation invocations and benedictions are: *Lundberg v. West Monona Community School Dist.*, 731 F. Supp. 331 (N.D. Iowa 1989); *Graham v. Central Community School Dist.*, 608 F.Supp. 531 (S.D. Iowa 1985); *Doe v. Aldine Indep. School Dist.*, 563 F. Supp. 883 (S.D. Tex. 1982); *Bennett v. Livermore Unified School Dist.*, 193 Cal. App. 3d 1012, 238 Cal. Rptr. 819 (1987); *Kay v. David Douglas School Dist.*, 79 Or. App. 384, 719 P.2d 875 (1986), *rev'd on other grounds*, 303 Or. 574, 738 P.2d 1389 (1987), *cert. denied*, 484 U.S. 1032; *seeD also North Carolina Civil Liberties Union v. Constangy*, No. C-C-89-438-M (W.D.N.C. Oct. 18, 1990) (judge's practice of opening daily sessions with recitation of brief prayer was unconstitutional).

16 While two members of the panel in *Stein* found the particular invocation and benediction at issue in that case to be excessively sectarian, all three judges upheld the general practice of including proper invocations and benedictions at public school graduation ceremonies.

17 Similarly, the Seventh Circuit applied *Marsh* in holding that a "prayer room" in the Illinois State Capitol building does not violate the Establishment Clause. *Van Zandt v.*

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To the *Stein* court's points we should add that graduation invocations and benedictions are but brief segments of a much longer, otherwise entirely secular ceremony. *See, e.g., Sands*, 262 Cal. Rptr. at 461, *review granted*, 264 Cal. Rptr. 683 (1989) (graduation invocation "was a brief and peripheral part of a ceremonial function"). In addition, school authorities do not themselves deliver these ceremonial acknowledgments of religion. They merely invite a private citizen to offer the invocation, authored by the speaker himself, just as they invite other speakers with different secular views to address the audience during the ceremony.[18]

In its first classroom prayer case, *Engel v. Vitale*, 370 U.S. 421 (1962) this Court recognized these distinctions:

> There is of course nothing in the decision reached here that is inconsistent with the fact that . . . there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the state of New York has sponsored in this instance.

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Thompson, 839 F.2d 1215 (7th Cir. 1988). The Seventh Circuit rejected the notion that *Marsh*'s analytical reach extends no farther than "the specific practices that date back to the enactment of the Bill of Rights." *Id.* at 1219.

18 The opinions below suggested another possible way in which the state would become undesirably involved in the issue, i.e., that courts would have to undertake a detailed review of the content of graduation invocations and benedictions, if such practices were allowed, to ensure that the content was constitutionally permissible. App. 12, 27a. But courts would need to conduct only a minimal review of content to ensure that it did not involve proselytization or disparagement of any religious view. As the Court said in *Marsh*

> The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.,

463 U.S. at 794-795. This minimal review of content is indeed no different from the required examination of the challenged practice in any Establishment Clause case to ensure that the practice does not have the primary purpose or effect of advancing or endorsing religion. In any event, the lower court's standard applied in this case by the courts below also requires a content-based examination of the invocations and benedictions to determine if the deity is referenced.

19 The Court in *School Dist. of Abington v. Schempp*, 374 U.S. 203 (1963) similarly affirmed ceremonial acknowledgments, stating

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370 U.S. at 435 n.21.[19]

For these reasons, graduation invocations and benedictions cannot sensibly be perceived as a real threat to the fundamental values protected by the First Amendment.[20] Certainly, these traditional ceremonial practices pose no greater threat to Establishment Clause values than do legislative invocations, upheld in *Marsh*; or spending large sums of public money for textbooks supplied throughout the country to students attending church-sponsored schools, upheld in *Board of Education v. Allen*, 392 U.S. 236 (1968); or spending public funds for transportation of students to church-sponsored schools, upheld in *Everson v. Board of Education*, 330 U.S. 1 (1947); or providing federal grants for buildings at church-sponsored colleges, upheld in *Tilton v. Richardson*, 403 U.S. 672 (1971); or providing noncategorical grants to church-sponsored colleges and universities, upheld in *Roemer v. Board of Public Works*, 426 U.S. 736 (1976); or granting tax exemptions for church properties, upheld in *Walz, supra*; or enforcing Sunday Closing Laws, upheld in *McGowan v. Maryland*, 366 U.S. 420 (1961); or adopting a release time program, upheld in *Zorach, supra*. *See Lynch*, 465 U.S. at 681-682; *Marsh*, 463 U.S. at 791.

In sum, the references to the deity uttered by Rabbi Gutterman did not pose any real threat of establishing an official religion in Providence, Rhode Island. It is by no means far-fetched, however, that the decision of the courts below, requiring that school officials take care to exclude all references to a deity future graduation ceremonies, will send a message of official hostility toward religion. As Justice O'Connor said in *County of Alleghany*, 109 S. Ct. at 3117: "The Court has avoided drawing lines which entirely sweep away all government recognition and acknowledgement of the role

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> This background [of the Founding Father's religious devotion] is evidenced today in our public life through the continuance in our oaths of office from the Presidency to the Alderman of the final supplication, "So help me God." Likewise each House of the Congress provides through its Chaplain an opening prayer, and the sessions of this Court are declared open by the crier in a short ceremony, the final phrase of which invokes the grace of God.

374 U.S. at 213.

20 See Marsh, 463 U.S. at 791, 795; *Lynch*, 465 U.S. at 686 ("Any notion that these symbols pose a real danger of establishment of a state church is far-fetched indeed."); *Grossberg*, 380 F. Supp. at 289.

of religion in the lives of our citizens for to do so would exhibit not neutrality but hostility to religion."

II The Establishment Clause Is Not Violated Absent Direct or Indirect Government Coercion On Nonadherents' Religious Freedom

As discussed in Part I, this case is distinguishable from the Court's classroom prayer cases primarily by the absence here of any government coercion, even indirect, on those present at the graduation ceremony to conform on matters of faith. The instant case thus raises a larger issue in Establishment Clause jurisprudence, one that has recently received considerable judicial and scholarly attention: whether direct or indirect government coercion is a necessary element of an Establishment Clause violation. We submit that it is, and that this Court's adoption of such a standard would go far toward rationalizing an Establishment Clause jurisprudence that, respectfully, has yielded manifest inconsistency in judicial decisions and has thus caused great uncertainty among those who must conform their conduct to the sacred demands of the First Amendment.

First, and most important, a rule that looks to whether the challenged policy actually serves as an inducement or barrier, whether crude or subtle, to individual religious choice best comports with the fundamental purpose and original understanding of the Establishment Clause. There is a strong consensus that the basic goal of the Establishment Clause is to prohibit "government from making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring).[21] Since the Establishment Clause is thus concerned with the standing of nonadherents, it is difficult to understand how it is violated absent a cognizable effect on the nonadherent's freedom to follow the dictates of his own conscience. It would seem, rather, that Establishment Clause values are infringed only by governmental actions that somehow induce the nonadherent's religious conformity, either by burdening nonreligious conduct or by rewarding religious conduct. *See*

21 See *also Walz*, 397 U.S. at 672 ("[e]ach value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so"); *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961) (plurality opinion); *Jaffree*, 472 U.S. at 68 (O'Connor, J., concurring) ("[a]lthough a distinct jurisprudence has enveloped each of [the Religion] Clauses, their common purpose is to secure religious liberty"); *County of Allegheny*, 109 S. Ct. at 3135 (Kennedy, J., concurring in the judgment in part and dissenting in part).

County of Allegheny, 109 S. Ct. at 3135-3137 (Kennedy, J., concurring in the judgment in part and dissenting in part). It would also seem that governmental *speech*, as opposed to financial aid or regulation, would normally not constitute such an impermissible inducement or barrier.[22] To be sure, it is certainly possible for government speech to coerce,[23] and the government's purpose might well be relevant to whether its speech did in fact become coercive. The constitutional touchstone, however, should be whether the governmental practice did indeed have a coercive effect on the nonadherent, rather than whether the government was motivated by a desire to send a message of "endorsement" or otherwise evince "approval" of religion.

Recent judicial and scholarly examinations of the history surrounding the framing of the First Amendment strongly support the conclusion that some element of coercing or limiting religious choice was viewed by the Framers as necessary to a finding of unconstitutional establishment. *See also County of Allegheny*, 109 S. Ct. at 3135-3138 (Kennedy, J., concurring in the judgment in part and dissenting in part); *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 135-137 (7th Cir. 1987) (Easterbrook, J., dissenting); McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933 (1986).

For example, when introducing the Establishment Clause in the First Congress, James Madison stated that he "apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in a manner contrary to their conscience." 1 *Annals of Congress* 730 (J. Gales ed. 1834) (Aug. 15, 1789). He further stated that the Clause addressed the fear that "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." *Id.* at 731. And in his famous *Memorial and Remonstrance Against Religious Assessments*, Madison said that the proposed tax for Christian teachers in Virginia was an impermissible establishment because "compulsive support"

22 Governmental speech, even that which is quite intimidating and perjorative, is extremely unlikely to create a constitutionally cognizable burden on private expressive activities. *See, e.g., Meese v. Keene*, 481 U.S. 4654, 480 (1987) (labeling of foreign films as "political propaganda" places "no burden on protected expression").

23 *See County of Allegheny*, 109 S. Ct at 3137 (Kennedy, J., concurring in the judgment in part and dissenting in part); *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 134 (7th Cir. 1987) (Easterbrook, J., dissenting).

of religion is "unnecessary and unwarrantable." Madison, *A Memorial and Remonstrance Against Religious Assessments* (June 20, 1785) ¶ 4. Similarly, Thomas Jefferson's *Virginia Bill for Religious Liberty* provided in part: "That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief." 12 Hening, Statutes of Virginia 84 (1823) (quoted in *Everson*, 333 U.S. at 13).

Moreover, coercion is a much more workable and certain standard to guide Establishment Clause analysis. Examination of the motives of governmental bodies and determining whether the "message" received by objective observers is impermissible "approval" or permissible celebrations of "religious pluralism" necessarily involves a large element of subjectivity and requires serious inquiry into such minutiae as whether nonbelievers would be less offended "were the creche five feet closer to the jumbo candy cane." *American Jewish Congress*, 827 F.2d at 130 (Easterbrook, J., dissenting). A constitutional doctrine that conclusively presumes that governmental speech "approving" or "endorsing" religion inexorably alienates nonbelievers has the clear potential for invalidating numerous long-accepted and familiar traditions. And such an approach condemns the Court to enmesh itself in inherently fact-bound, exquisite determinations concerning whether certain practices are more akin to, for example, legislative prayer or a creche in city hall, and it inevitably yields the palpable inconsistencies that have characterized the Court's Establishment Clause jurisprudence.[24]

Further, noncoercive religious speech is, almost by definition, innocuous to all but the most intolerant of nonadherents. Holding such practices unconstitutional not only trivializes and confuses analysis under the Religion Clauses, it affirmatively undermines the purposes of those First Amendment provisions. For unyielding judicial extirpation of all official acknowledgments that could be perceived as evincing "approval" of religion would plainly send a message of disapproval, and thus would skew public speech by "preferring those who believe in no religion over those who do believe." *Zorach*, 443 U.S. at 314 (1952).

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24 *See, e.g., Walz*, 397 U.S. at 668; *Jaffree*, 472 U.S. at 68-69 (O'Connor, J., concurring); *id.* at 107-11 (Rehnquist, J., dissenting); *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890, 903 (1989) (opinion of Brennan, J.); *id.* at 905-906 (opinion of Blackmun, J.).

We do not mean to suggest that a coercion standard would obviate all line drawing or hard cases; detecting the presence of subtle, indirect coercion can be difficult. It will, however, help focus the Court's attention on practices that pose some realistic threat to Establishment Clause values and thus will eliminate a host of cases that do not warrant judicial attention. The *true* distinction between Thanksgiving Proclamations and classroom prayer is neither the nature of the religious purpose nor the "message" sent to nonbelievers concerning the government's attitude towards religion. It is, rather, the difference in the coercive effect of these practices on nonbelievers. Establishment Clause jurisprudence should thus be concerned with this genuinely distinguishing factor.

As noted earlier, the invocation and benediction struck down in this case as an establishment of religion pose none of the dangers of coercion that the Court has found in the classroom prayer cases and in the other cases invalidating official religious indoctrination.[25] It is simply difficult to

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25 *Engel*, a case involving obvious "indirect" coercion, stated only that the Establishment Clause "does not depend upon any showing of *direct* governmental compulsion and is violated . . . whether [the challenged practices] operate *directly* to coerce nonobserving individuals or not." 370 U.S. at 430 (emphasis added). Similar indirect coercion was also present in *Stone v. Graham*, 449 U.S. 39, 42 (1980), where the Court found that impressionable school children's daily exposure to the Ten Commandments posted on the classroom wall would tend to "induce the schoolchildren to read, meditate upon, perhaps to venerate and obey" these sectarian commands. Other cases suggesting that coercion is not a necessary element of an Establishment Clause violation have involved the provision of taxpayer dollars or similar governmental support to religion. *See, e.g., Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985); *Committee For Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973). Finally, the Court has indicated on a number of occasions that compulsion or coercion of nonbelievers is the essence of an establishment of religion. *See, e.g., McGowan v. Maryland*, 366 U.S. 420, 441 (1961); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (the Religion Clauses "forestall[] compulsion by law of the acceptance of any creed or the practice of any form of worship"); *Everson*, 330 U.S. at 15-16; *Braunfeld*, 366 U.S. at 606 ("To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e. legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature."); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985) ("unyielding" preference for Sabbath Observers required fellow employees to "'conform their conduct to [others'] religious necessities.'") (quoting *Otten v. Baltimore & Ohio R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953)); *Jaffree*, 472 U.S. at 81 (O'Connor, J., concurring in the judgment) ("Presidential Proclamations are distinguishable from school prayer in that they are received in a noncoercive setting and are primarily directed at adults, who presumably are not readily susceptible to unwilling religious indoctrination"). *Cf. Bowen v. Roy*, 476 U.S. 693, 699 (1986) (Free Exercise Clause

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believe that Mr. Weisman or his daughter felt inhibited in their religious choices — or in any way alienated from the political community — because Rabbi Gutterman made reference to God. Accordingly, while the graduation invocations and benedictions at issue here are not, for the reasons discussed in Part I above, unconstitutional "endorsements" of religion, we nonetheless believe that the Court should examine the question whether some form of official coercion is a necessary element of an Establishment Clause violation and should reverse the courts below on the basis that it is.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this petition for a writ of certiorari to the United States Court of Appeals for the First Circuit be granted and the case set for plenary review.

Respectfully submitted,

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"affords an individual protection from certain forms of governmental compulsion; it does not afford an individual the right to dictate the conduct of the Government's internal procedures"). We recognize, of course, that the coercion test we advocate is in obvious, perhaps irreconcilable, tension with the result and some of the opinions in *County of Allegheny*.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 90-1151

DANIEL WEISMAN, ETC.,
Plaintiff, Appellee,

v.

ROBERT E. LEE, ET AL.,
Defendants, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
[Hon. Francis J. Boyle, *U.S. District Judge*]

Before

Campbell, *Circuit Judge*,
Bownes, *Senior Circuit Judge*,
Torruella, *Circuit Judge*.

Joseph A. Rotella, was on brief for appellants.

Sandra A. Blanding, with whom *Revins, Blanding, Revens & St. Pierre*, was on brief for appellee.

JULY 23, 1990

TORRUELLA, *Circuit Judge*. This is an appeal from the United States District Court for the District of Rhode Island. The issue presented for review is whether a benediction invoking a deity delivered by a member of the clergy at an annual public school graduation violates the Establishment Clause of the First Amendment of the Constitution as construed by the Supreme Court under the second prong of the *Lemon* test. *See Lemon v. Kurtzman*, 482 U.S. 602, 612-13 (1971). The district court held that it did. 728 F. Supp. 68 (D.R.I. 1990).

We are in agreement with the sound and pellucid opinion of the district court and see no reason to elaborate further.

Affirmed.

Concurrence over

BOWNES, *Senior Circuit Judge* (concurring). Although the district court wrote a very good opinion, which I join in affirming, I am compelled to make some additional comments of my own because of the significance of this case and the strong emotions that it and other Establishment Clause cases generate.[1]

Over three hundred and fifty years ago, Roger Williams was banished from the Massachusetts Bay Colony for, among other "heresies," arguing that the civil government should be completely separate from religion.[2] He travelled south and founded what became the state of Rhode Island, which was the first colony to require the separation of church and state.[3] Since that time the people of Rhode Island have been sporadically involved in probing the permissible intersections between religion and government. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668 (1984); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (deciding *Robinson v. DiCenso*). Once again this volatile and troublesome issue is before us.

We are asked to determine whether the Establishment Clause prohibits public prayer at a public middle school[4] graduation ceremony. Broadly, this

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1 I am troubled by a report in The Boston Globe that officials at a school in Rhode Island have intentionally violated Judge Boyle's ruling by having a prayer at a graduation. Boston Globe, June 10, 1990 at 67. This blatant disregard for the law drew "howls of approval[,] applause, and cheers" at the graduation. Similar disobedience of the law has followed decisions in other recent prayer cases. See N.Y. Times, Sept. 2, 1989 at 1 (*Football Prayer Ban stirring Anger in South*) (disobedience of *Jager v. Douglas County School District*, 862 F.2d 824 (11th Cir. 1989)).

I point out that there is formidable religious authority condemning prayer in public:

> And when thou prayest, thou shall not be as the hypocrites are: for they love to pray standing in the synagogues and in the corners of the streets, that they may be seen of men .... when thou prayest, enter in to thy closet, and when thou has shut the door, pray to thy Father in secret. But when ye pray, use not vain repetitions, as the heathen do: for they think they shall be heard for their much speaking.

Matthew 6: 5-7 (King James).

2 A contributing factor in his exile was his controversial interpretation of the Bible, which was the political as well as religious guide for the Puritans. Similarly, this case raises the subsidiary question of how to read the Constitution.

3 Charter of Rhode Island and Providence Plantations, July 8, 1663, *reprinted in Sources of Our Liberties*, 162 (R. Perry ed. 1978).

4 A middle school, as the name implies, is the school that children attend after grade school and before high school.

requires us to examine the text of the Constitution and interpret its meaning based on the various tools of constitutional analysis. In its narrowest aspect, we must examine Supreme Court Establishment Clause precedent to determine whether a prayer at a middle school graduation ceremony is similar enough to prayer in the classroom to be controlled by the Court's cases prohibiting school prayer. *Wallace v. Jaffree*, 472 U.S. 23 (1985) (daily moment of silence expressly for prayer); *Stone v. Graham*, 449 U.S. 39 (1980) (posting of ten commandments in school rooms); *Abington School District v. Schempp*, 374 U.S. 203 (1963) (daily Bible reading); *Engel v. Vitale*, 370 U.S. 421 (1962) (daily prayer). Appellants claim that a graduation benediction is more like the legislative prayer approved in *Marsh v. Chambers*, 463 U.S. 783 (1983), and therefore the school prayer cases are not controlling.

1. THE TEXT OF THE CONSTITUTION.

I begin my discussion with an examination of the text of the Constitution. Unlike earlier political documents, such as the Declaration of Independence,[5] the Constitution is completely secular, neither invoking nor referring to "God" or any deity.[6] The First Amendment prohibits "laws respecting the establishment of religion." U.S. Const. amend. I.[7]

The scope of that prohibition has proven extremely difficult to delineate and implement in contemporary society. The words of the Amendment give

5 *Amicus Curie* National Legal Foundation would have us read the religious imagery of the Declaration into the Constitution. There is no justification for such a reading. The omission of a reference to a Deity in the Constitution was not inadvertent; nor did it remain unnoticed. *Marsh*, 463 U.S. at 897 (Brennan, J., dissenting) (quoting Pfeffer, *The Deity in American Constitutional History*, 23 J. Church & State 215, 217 (1981)). In fact, it is a striking affirmation of the Establishment Clause.

6 In the Constitution of 1787, "religion" only appears in Article VI ("no religious test shall be required").

7 The Amendment has been applied to the states through the Fourteenth Amendment in *Cantwell v. Connecticut*, 310 U.S. 296 (1940). The Establishment Clause was applied to the states in *Everson v. Board of Education*, 330 U.S. 1 (1947). There was a dispute over whether the Congress that passed the Fourteenth Amendment thought that it would incorporate the Bill of Rights. This dispute focused on the weight that should be given to Congress's consideration of the "Blaine Amendment" after the Fourteenth Amendment had been enacted. The Amendment would have expressly applied language similar to the First Amendment to the states. *See also Abington*, 374 U.S. 254-59 (Brennan, J., concurring) (discussing the incorporation of the Amendment). *See generally*, A. Meyer, *The Blaine Amendment and the Bill of Rights*, 64 Harv. L. Rev. 939 (1951).

us some indication of its meaning. The use of the word "respecting" indicates that a broader sweep should be given to "establishment," thus prohibiting many actions that could lead to the establishment of religion. *County of Allegheny v. ACLU*, 109 S. Ct. 3086, 3130 (1989) (Stevens, J., concurring in part, dissenting in part) (" 'Respecting' means concerning or with reference to. But it also means with respect — that is 'reverence,' 'goodwill,' .... Taking into account this richer meaning, the Establishment Clause, in banning laws that concern religion, especially prohibits those that pay homage to religion."); *see also Lemon*, 403 U.S. at 612; *Engel*, 370 U.S. at 436. In addition, the use of "religion" rather than "church" implies a prohibition against more than merely an established national church. *See, e.g., Everson*, 330 U.S. at 31 ("Madison could not have confused 'church' and 'religion' or 'an established church' and an establishment of 'religion.'"). Beyond these preliminary inquiries, the "plain meaning" of the text is of little help in determining results in this case, so we must turn to the interpretation and practice that has evolved throughout the past two hundred years.

In trying to create meaning from the Establishment Clause, courts and commentators have constructed various historical arguments. But historians have decidedly mixed views about what "establishment" meant to

8 Extensive debate surrounds what exactly "the" framers of the Constitution meant or intended. At least three distinct major strands have been isolated, each identified with an individual: Jefferson, Williams and Madison. Jefferson focused on a "wall of separation between church and state" to protect the state from the church. *See, e.g., Reynolds v. United States*, 98 U.S. 145, 164 (1879); Letter from Thomas Jefferson to Nehemiah Dodge and others, A Committee of the Danbury Baptist Association (Jan. 1, 1802) *reprinted in* 5 P. Kurland, *The Founders' Constitution* 96 (1987); *see also Everson*, 330 U.S. at 28; *But cf. Wallace*, 472 U.S. at 92 (Rehnquist, J., dissenting) ("The Establishment Clause has been expressly freighted of Jefferson's misleading metaphor for nearly 40 years .... He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the religion clauses of the First Amendment."). Williams thought that a "hedge or wall of separation [should exist] between the garden of the church and the wilderness of the world" in order to protect religion from the corruption of the world. *See generally*, P. Miller, *Roger Williams: His Contribution to the American Tradition* 99 (1953). Madison's view was that competition among sects both religious and political was in everyone's best interest. Justice Rehnquist has tried to distinguish between Madison "as an advocate of sensible legislative compromise and not as an advocate of incorporating the Virginia Statute of Religious Liberty" to support the proposition that Madison believed the single intent of the amendment was to prevent the establishment of a national church (such as the Church of England). *Wallace*, 472 U.S. at 98 (Rehnquist, J., dissenting). This approach has been criticized. *See, e.g., Wallace*, 472 U.S. at 79 (O'Connor, J., concurring).

the framers. Judges and historians have been unable to agree about what ideas informed the writing of the Constitution[8], what exactly occurred in the debates surrounding ratification (the specific intent of the framers),[9] or what impact the "religious character" of various post-ratification practices should have on the meaning we give to the Constitution.[10]

The Court has spent considerable time considering and debating the history of the religion clauses, and each time the results have been inconclusive. *Compare Wallace*, 472 U.S. at 79-84 (O'Connor, J., concurring) ("The primary issue raised by Justice Rehnquist's dissent is whether the historical fact that our Presidents have long called for public prayers of thanks should be dispositive on the constitutionality of prayers in the public schools. I think not.") *with Wallace*, 472 U.S. at 91-114 (Rehnquist, J., dissenting); *compare Marsh*, 463 U.S. at 786-792 *with Marsh*, 463 U.S. at 813-817 (Brennan, J., dissenting) (discussing the extent to which the practices of the First Congress reveal the intent behind and support interpretations of the Constitution); *compare Everson*, 330 U.S. at 8-16 *with Everson*, 330 U.S. at 28-43 (Rutledge, J., dissenting); *see also Engel*, 370 U.S. at 425-30. *See generally Abington*, 374 U.S. at 232-265 (Brennan, J., concurring) (scholarly discussion of the role of the history in interpreting the Establishment Clause). It is useless to rehash this continuing debate. The ground has been trodden so much that it is barren of meaning and

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9 Legislative history is virtually non-existent for this provision. *Marsh*, 463 U.S. at 814 (Brennan, J., dissenting). *But see County of Allegheny*, 109 S. Ct. at 3129-30 (Stevens, J., concurring in part, dissenting in part); *Wallace*, 472 U.S. at 91-100 (Rehnquist, J., dissenting).

10 Religious practice in the nineteenth century is not a persuasive argument about the meaning of the Constitution because historians have noted that the various religious practices of the government in the nineteenth century were more expansive than at the time of ratification. Christmas and Thanksgiving became national holidays at that time, for example. *See generally* Botein, *Religious Dimensions of the Early American State reprinted in* R. Beeman, S. Botein and E. Carter, *Beyond Confed ration: Origins of the Constitution and American National Identity* 315 (1987) (discussing the increase in religious practice by the government in the nineteenth century).

11 The debate about the history of the Establishment Clause highlights problems of historical theory in the Court's opinions. Historians recover "facts" and, through selecting certain facts from the universe of available facts, construct narratives that explain a historical problem. Historical interpretations are not "facts" but rather are narratives drawn from the facts selected by the historian. *See generally*, H. White, *Interpretation in History, reprinted in* H. White, *Tropics of Discourse* (1978); H. White, *Metahistory: The Historical Imagination in Nineteenth-Century Europe* (1973).

persuasive power. The "historical record" is inconclusive on the various cross-currents in the minds of the framers. Because of the tangled and often conflicting historical record, it is unlikely that, as an empirical matter, we can ever know the original intention of the authors of the Constitution.[11]

Even if we could reconstruct the framers' intent, that would not necessarily be determinative in this case, given our two hundred years of experience with the Constitution and changing circumstances. *See, e.g., County of Allegheny*, 109 S. Ct. at 3099 ("Perhaps in the early days of the republic [the prohibitions of the Establishment Clause] were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism" (quotation and citation omitted)). *See generally Abington*, 374 U.S. at 232-265 (Brennan, J., concurring); T. Jefferson, *Autobiography reprinted in The Founders' Constitution* 85 ("The bill for establishing religious freedom . . . meant to [include] within the mantle of its protection, the Jew and the Gentile, the Christian and the Mahometan, the Hindoo and Infidel of every denomination."). An additional facet of the problem of framers' intent is what was the framers' intention about their intent. Scholars have argued that the original intention of the framers was that their intentions were irrelevant to interpreting the Constitution. *See, e.g.*, H.J. Powell, *The Original Understanding of Original Intention*, 98 Harv. L. Rev. 885 (1985).

2. THE SCHOOL PRAYER CASES.

Although the Court may have sent confusing signals on the theoretical or historical underpinnings of the Establishment Clause, it has strictly and consistently interpreted the prohibitions of the Establishment Clause in cases involving prayer in the public schools. The Court

> has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views

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12 *Wallace v. Jaffree*, 472 U.S. 23 (1985) (daily moment of silence expressly for prayer); *Stone v. Graham*, 449 U.S. 39 (1980) (posting of ten commandments in school rooms); *Abington School District v. Schempp*, 374 U.S. 203 (1963) (daily bible reading); *Engel v. Vitale*, 370 U.S. 421 (1962) (daily prayer).

> that may conflict with the private beliefs of the student or his or her family.

Edwards v. Aguillard, 482 U.S. 578, 585 (1987). The Court has consistently struck down laws or practices that allow or mandate forms of prayer in the schools,[12] and it has never allowed a prayer at a formal school function. *But see Board of Education v. Mergens*, 58 U.S.L.W. 4720 (U.S. 1990) (allowing Christian club as voluntary extracurricular activity at public school).

The appellants argue that this case is not controlled by the school prayer cases because graduation attendance is voluntary, graduation sometimes takes place off-campus, and it occurs only once a year. They contend that the prayers are acceptable under either the prevailing *Lemon* test or under the exception to that standard delineated in *Marsh v. Chambers*. Such arguments have been rejected by other courts. *See, e.g., Jager v. Douglas County School District*, 862 F.2d 824 (11th Cir. 1989) (prohibiting prayer before high school football game and rejecting the use of *Marsh*), *cert. denied*, 109 S. Ct. 2431 (1989); *Graham v. Central Community School Dist.*, 608 F. Supp. 531 (D. Iowa 1985) (prohibiting prayer at high school graduation and rejecting application of *Marsh*); *see also Schempp*, 374 U.S. at 224-25 ("[T]he fact that individual students may absent themselves . . . furnishes no defense to a claim of unconstitutionality under the Establishment Clause"); *Engel*, 370 U.S. at 430 ("[T]he fact that the [prayer] on the part of students is voluntary can[not] serve to free it from the limitations of the Establishment clause.").

3. THE *LEMON* TEST.

In evaluating the acceptability of practices under the Establishment Clause, the Court has generally applied a derivative of the three-pronged "*Lemon*" test:

> First, the [practice] must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, [it] must not foster 'an excessive government entanglement with religion.'

Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (citations omitted). A practice or statute that fails to meet any of these requirements violates the Establishment Clause. *See Edwards*, 482 U.S. at 483. Only one Establishment Clause case since *Lemon* has not applied some form of this test. *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987) (referring to *Marsh v. Chambers*, 463 U.S. 783 (1983), which did not involved public schools); *see also County of Allegheny v. ACLU*, 109 S. Ct. 3086, 3100 n.4 (1989) (collecting cases that have used *Lemon* test); *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 383 (1985) ("We have particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children.").

The district court properly and carefully applied this test and determined that the practice of invocations and benedictions at school graduations ran afoul of the second, "effect," prong of the *Lemon* test.

A. Secular Purpose

The secular purpose prong of *Lemon* requires us to determine whether the predominant purpose of the practice in question is secular. The question is not whether there is or could be any secular purpose, but rather whether the actual predominant purpose is to endorse religion. *Wallace*, 472 U.S. at 56; *see also Lynch*, 465 U.S. at 690 ("The purpose prong . . . asks whether the government's actual purpose is to endorse or disapprove of religion."). That requirement "is precisely tailored to the Establishment Clause's purpose of assuring that Government not intentionally endorse religion or religious practice." *Wallace*, 472 U.S. at 75 (O'Connor, J., concurring). In examining the secular purpose, the Court has examined whether the stated purpose is "sincere and not a sham." *See, e.g., Edwards*, 482 U.S. at 587 (Louisiana's creation science act, although purporting to foster "academic freedom," in fact did not have a secular purpose); *Stone*, 449 U.S. at 41 ("[T]he Ten Commandments are undeniably a sacred text in the Jewish and Christian Faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.").

Although reciting a prayer before a graduation ceremony might, as appellants argue, have the residual sectarian effects of solemnizing the occasion,[13] the primary purpose is religious. Specifically invoking the name and the blessing of "God" on the graduation ceremony is a supplica-

13 It is ironic that many groups that advocate prayer (or "religious liberty"), argue that prayer has no religious intent or effect. They emphasize the "solemnizing function" of an invocation or benediction at graduation and other ceremonies. Inevitably, they analogize prayer to public situations where religion is a dead letter, such as the use of "God" on coins or the "under God" language in the Pledge of Allegiance, to support their position. I am surprised that religious groups would support an argument that explicitly relegates the value of religion in our society to the merely ceremonial.

tion and thanks to "God" for the academic achievement represented by the graduation and a hope for the continuation of such good fortune. It does not serve a purely or predominantly solemnizing function. A graduation ceremony does not need a prayer to solemnize it.

B. Secular Effect

Justice O'Connor has tried to focus the secular effect discussion on the government's endorsement of religion: "What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion." *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring). As the district court held, it is self-evident that a prayer given by a religious person chosen by public school teachers communicates a message of government endorsement of religion.

C. Excessive Entanglement

The excessive entanglement prong prohibits actions that "may interfere with the independence of institutions." *Lynch*, 465 U.S. at 667 (O'Connor, J., concurring). In particular, this prong is concerned with the state impermissibly monitoring or overseeing religious affairs. *Marsh*, 463 U.S. at 798-99 (*citing Lemon*, 403 U.S. at 614-22). For example, the Court struck down a provision of a zoning ordinance that allowed churches "veto" power over liquor licenses within 500 feet of the church. *Larkin v. Grendel's Den*, 459 U.S. 116 (1982). Implicit in this prong, and central to any understanding of the First Amendment, is the belief that the government should not become involved with the determination of religious practice.

Although neither party strongly advances arguments on this prong, I am struck by the instances of entanglement in this case. In *Jager*, the court found no entanglement problem because the school did not monitor the content of the prayers or choose the speaker. *Jager*, 862 F.2d at 831. Here school officials did both. Appellants make much of the fact that the school has chosen to give a suitably non-denominational prayer because school officials distributed a pamphlet entitled "Guidelines for Civic Occasions." These guidelines suggest what kind of prayers should be written. This supervision of the content of the prayers by the school officials implicates the entanglement prong. The school is impermissibly involved in regulating the content of the prayer. In addition, unlike both *Stein* and *Jager*, school teachers chose the speaker who gave the prayer at graduation. This has the

effect of involving those teachers in choosing among various religious groups, an activity that is surely prohibited by the Establishment Clause.

4. *MARSH*

Recognizing the strictness of the *Lemon* test, the appellants urge that we follow the limited exception to the application of the test delineated in *Marsh v. Chambers*, 463 U.S. 783 (1983). In *Marsh*, the Supreme Court upheld the practice of the Nebraska Legislature to begin each legislative session with a prayer. *Marsh* was based on the "unique" and specific historical argument that the framers did not find legislative prayers offensive to the Constitution because the first Congress approved of legislative prayers. *Marsh*, 463 U.S. at 791.

That history and those special circumstances are not present at middle school graduations. The Court has specifically stated that "[s]uch a historical approach is not useful in determining the proper roles of church and state in public schools, since free public schools were virtually nonexistent at the time the Constitution was adopted." *Edwards*, 482 U.S. at 583 n.4; *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 390 n.9 (1985) (the Court has "never indulged a similar assumption [to *Marsh*] with respect to prayers conducted at the opening of the school day."); *see also Jager v. Douglas County School Dist.*, 862 F.2d 824 (11th Cir. 1989) (recognizing that *Marsh* is inapplicable to school invocations); *Graham v. Central Community School*, 608 F. Supp. 531, 535 (D. Iowa) (same); *but see Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987) (apparently applying *Marsh* exception in the context of school invocations/benedictions but still finding Establishment Clause violation).

A number of differences between this case and *Marsh* reinforce my view that *Marsh* is inapplicable to school prayer cases. Middle school students are at a very different stage in their development and relationship to the prayers than are state legislators. The legislators are able to debate and vote on whether and where to have prayers; students have the prayers imposed upon them. Appellants argue that because this is only a once-a-year occurrence it does not implicate the Establishment Clause the way daily prayers do. I disagree. Because graduation represents the culmination of years of schooling and is the school's final word to the students, the prayer is highlighted and takes on special significance at graduation.

The *Stein* decision does not help the appellants. In *Stein*, a Sixth Circuit panel struck down a school invocation and benediction as violating the Establishment Clause. *Stein*, 822 F.2d 1406 (6th Cir. 1987). Each judge wrote an opinion. Judge Merritt, in the court's opinion, thought that the *Marsh* exception applied to school prayer but held that the content of the prayer in question violated the Establishment Clause because it was not sufficiently non-denominational. Judge Milburn concurred in result but added that the *Lemon* test should also be applied in examining the invocations and benedictions. Judge Wellford dissented, stating that the *Lemon* test should be applied and that under that test the prayer before the court was acceptable. Such a split in the panel, particularly when the result is contrary to what the appellants seek, is not persuasive authority.

In addition, the analysis of the judges in the majority, in which they parse through the content of the prayers to determine if they are not too offensive, is troubling. The court prohibited the specific prayer because "the language says to some parents and students: we do not recognize your religious beliefs, our beliefs are superior to yours." *Stein*, 822 F.2d at 1410. But the judges imply that some prayers are denominationally neutral enough to offend no one. Such a prayer would be acceptable, under the court's view in *Stein*, under the Establishment Clause. This, I suggest, would be contrary to the teachings of the Court. *See Engel v. Vitale*, 370 U.S. 421, 430 ("[T]he fact that the prayer may be denominationally neutral . . . can [not] serve to free it from the limitations of the Establishment Clause."). Such a prayer would also be extremely difficult, if not impossible, to compose. *See Marsh*, 463 U.S. at 819-21 (Brennan, J., dissenting) (cataloguing the problems with creating a non-denominational prayer).

Judges should not be passing on the acceptability of specific passages in prayers. *See, e.g., Marsh*, 463 U.S. at 794 ("The content of the prayer is not of concern to judges."). The ruling in *Stein* invites parents and students to review prayers to determine if the content is sufficiently neutral. That creates more rather than less religious friction by encouraging individuals to debate the content of prayers.

5. THE USE OF A DEITY.

The district court made some statements in the course of its opinion that were in the same vein as the *Stein* court's discussion of non-denominational prayer. Relying on the fact that the invocation and benediction referred to a deity, the court stated that if "God" "had been left out of the benediction

. . . the Establishment Clause would not be implicated." *Weisman v. Lee*, 728 F. Supp. 68, 74 (D.R.I. 1990). This, in my opinion, is too literal and narrow an interpretation of prayer and of what is acceptable under the Constitution. The Constitution prohibits prayer in public schools and not merely references to a deity. An invocation (literally invoking the name of God over the proceedings) and a benediction (blessing the proceedings) are by their very terms prayers and religious. A benediction or invocation offends the First Amendment even if the words of the invocation or benediction are somehow manipulated so that a deity is not mentioned. *See, e.g., Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981), *aff'd.*, 455 U.S. 913 (1982) ("[P]rayer is perhaps the quintessential religious practice for many of the world's faiths . . . [it is] an address of entreaty, supplication, praise, or thanksgiving directed toward some sacred or divine spirit, being or object."). Although I think it is probably impossible to pray without invoking a deity directly or indirectly,[14] the direct reference to a deity should not be the constitutional touchstone for our analysis.

In sum, as Justice Black stated long ago,

> the 'establishment of religion' clause of the First Amendment means at least this: neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion to another.

Everson, 330 U.S. at 15. By having benedictions and invocations at school graduations, the Providence School District has violated the Establishment Clause. I concur in affirming the opinion of the district court.

Dissent over.

14 Even the "Guidelines for Civic Occasions" recognize that public prayer must "remain faithful to the purposes of acknowledging divine presence and seeking blessing."

CAMPBELL, *Circuit Judge* (Dissenting). As Judge Torruella states, Chief Judge Boyle's opinion for the district court is indeed "sound and pellucid," in that it expresses well what may be the Supreme Court's ultimate view in this confused area of the law. I say "may." As indicated below, I prefer another view but am aware that the district court's position may be more in keeping with Supreme Court consensus.

I am less amenable to Judge Bownes' reasoning. His seems to me an extreme position, especially his view that a benediction would offend the First Amendment even if a deity were not even mentioned. Judge Bownes would apparently strike down the benediction suggested by the district court (which uses the same words as the challenged prayer, but omits all references to God). That version reads in part, as follows: "For the legacy of America where diversity is celebrated and the rights of minorities are protected we are thankful. . . . May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled." *See Weisman v. Lee*, 728 F. Supp. at 74-5, n.10. It is difficult to see why this would violate the Establishment Clause. The First Amendment prohibits the making of a law "respecting an establishment of religion, or prohibiting the free exercise thereof." What is there so religious about expressing thanks for diversity and for the protection of minority rights? Is Thanksgiving a forbidden rite? Must courts outlaw the public reading of Walt Whitman or Keats's "Ode on a Grecian Urn"?

These extreme views of my colleague suggest the problems that inhere in banning invocations — including those that mention a deity. By so doing we deprive people of an uplifting message that seems especially suitable for a rite of passage like a graduation, where those present wish to give deeply felt thanks. Our First Amendment jurisprudence normally protects speech rather than suppressing it. It seems anomalous to outlaw Rabbi Gutterman's tolerant, benign, nonsectarian supplication — a message so entirely appropriate in that setting, and surely inoffensive to virtually all of those present.*

* Rabbi Gutterman's invocation reads, in its entirety, as follows:

> God of the free, Hope of the Brave:
>
> For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.
>
> For the liberty of America, we thank You. May these new graduates grow up to guard it.

> For the political process of America in which all its citizens may participate, for its court system where all can seek justice we thank You. May those we honor this morning always turn to it in trust.
>
> For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they help to share it.
>
> May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled. AMEN.

The Rabbi's benediction reads as follows:

> O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.
>
> Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them.
>
> The graduates now need strength and guidance for the future. Help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.
>
> We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion. AMEN.

If one were to ask what are the problems of our time, they would hardly respond that our youth and their parents are being corrupted by over-exposure to noble aspirations of this character. The common complaints are that 13 year old children are selling crack; that instead of doing homework, students are watching violent TV; that the tolerant ideals mentioned by the rabbi are being rejected in favor of destructive habits of mind and character. So what good, one might ask, is accomplished by preventing an invocation like this?

The answer, of course, is that we are also concerned to preserve the separation of church and state — a fundamental tenet of our Constitution, the benefits of which are undisputed. One need only look at Lebanon, Iran, and Northern Ireland to see what evils this tenet seeks to avoid.

Yet the question remains, is it necessary — to preserve separation of church and state — to prevent benedictions and invocations of this generous, inclusive sort? There is a tradition of such remarks at public functions going back to the Founders. *See Marsh v. Chambers*, 463 U.S. 783 (1983) (sustaining prayer at opening of state legislature's session). It seems unreasonable to say that *Marsh* applies only to state legislative sessions. One would expect it to cover other public meetings. If so, it may extend to a

(footnote continued)

graduation ceremony like this. *See Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987) (upholding nonsectarian prayers at a public school graduation). Chief Judge Boyle, nonetheless rejected the *Stein* and the *Marsh* analogy. He not only felt that *Marsh* was strictly limited to a *legislative* session, he also believed that prayer at a graduation ceremony was more analogous to prohibited school prayer than to prayer at a legislative session. He further feared church-state entanglement if courts must determine what prayers are nonsectarian enough to pass muster.

I am troubled most by Chief Judge Boyle's last point. Still, it seems reasonably simple to separate out sectarian from nonsectarian utterances. I suspect that most Americans of all persuasions — including the increasing numbers who adhere to religions or ethical systems outside the Judeo-Christian framework — find it is appropriate and meaningful for public speakers to invoke the deity not as an expression of a particular sectarian belief but as an expression of transcendent values and of the mystery and idealism so absent from much of modern culture.

I think that *Marsh* and *Stein* provide a reasonable basis for a rule allowing invocations and benedictions on public, ceremonial occasions, provided authorities have a well-defined program for ensuring, on a rotating basis, that persons representative of a wide range of beliefs *and ethical systems* are invited to give the invocation. The rule should make provision not only for representatives of the Judeo-Christian religions to give the invocation, but for representatives of other religions and of nonreligious ethical philosophies to do so. In some years, lay persons who do not represent any organized religion or philosophy might be asked to give a nonreligious invocation. The possibility exists, of course, that a particular audience might occasionally be exposed to a prayer redolent of a particular religious tradition, but the next year a different invocation would be given — perhaps by an agnostic. In brief, I think the First Amendment values are more richly and satisfactorily served by inclusiveness than by barring altogether a practice most people wish to have preserved.

It appears, both from the sensitivity of the delivered prayer and the nonsectarian guidelines drawn up by the Assistant Superintendent, that the Providence School Committee went some distance to ensure that different faiths were included and that prayers were nonsectarian. It may be, however, that even more needs to be done, to ensure not only that the state does not identify itself with a particular religion but with religion generally. If so, I would simply require the Committee to broaden its rules as above

suggested, and, otherwise, to continue to permit invocations and benedictions of diverse character at high school and middle school graduations.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

DANIEL WEISMAN, personally
and as next friend
of Deborah Weisman

v. C.A. No. 89-0377B

ROBERT E. LEE, individually and as principal of THE NATHAN BISHOP MIDDLE SCHOOL; THOMAS MEZZANOTTE, individually and as principal of CLASSICAL HIGH SCHOOL; JOSEPH ALMAGNO, individually and as Superintendent of the Providence School Department; VINCENT McWILLIAMS; ROBERT DeROBBIO; MARY BATASTINI; ALBERT LEPORE; ROOSEVELT BENTON; MARY SMITH; ANTHONY CAPIRO; BRUCE SUNDLUN and ROBERTO GONZALEZ, individually and as members of the Providence School Committee

OPINION

BOYLE, Francis J., Chief Judge.

The issue presented is whether a benediction or invocation which invokes a deity delivered by clergy at an annual public school graduation ceremony violates the first amendment of the United States constitution. This Court finds that because a deity is invoked, the practice is unconstitutional under the Establishment Clause of the first amendment as construed by the United States Supreme Court.

I. FACTS[1]

Each June, the Providence School Committee and Superintendent of Schools for the City of Providence sponsor graduation or promotion ceremonies in the city's public middle and high schools. The graduation ceremonies for high school students are generally held off school grounds, usually at Veterans Memorial Auditorium, which the Providence School Department rents for the occasion. Other sites have also been used. Middle school promotion ceremonies usually take place on school property, at the schools themselves.

The Providence School Committee and the Superintendent permit public school principals to include invocations and benedictions, delivered by clergy, in the graduation and promotion ceremonies. Over the past five or six years, most, but not all, of the public school graduation and promotion ceremonies have included invocations and benedictions. The practice has in fact been followed for many years.

The Assistant Superintendent of Schools has distributed to school principals a pamphlet entitled "Guidelines for Civic Occasions" as a guideline for the type of prayers to be used at the ceremonies. The pamphlet is prepared by the National Conference of Christians and Jews, a national organization with an office in Providence. The guidelines suggest methods of composing "public prayer in a pluralistic society," stressing "inclusiveness and sensitivity" in the structuring of non-sectarian prayer. The guidelines do not suggest the elimination of reference to a deity as appropriate.

Plaintiff Daniel Weisman's daughter, Deborah, was to graduate from Nathan Bishop Middle School, a public junior high school in Providence, in June of 1989. The ceremony was planned by two teachers from the school, and was to be held on the school grounds. Part of the program for that day included an invocation and benediction delivered by Rabbi Leslie Gutterman of the Temple Beth El of Providence. Four days before the ceremony was to take place, Plaintiff filed a motion for a temporary restraining order seeking to prevent the inclusion of prayer to a deity in the form of an invocation and benediction in the Providence public schools' graduation ceremonies. The day before the ceremony, this Court denied

1 The parties have filed an agreed statement of facts.

the Plaintiff's motion, essentially because the Court was not afforded adequate time to consider the important issues of the case.

On June 20, 1989, Deborah Weisman and her family attended the graduation ceremony for Deborah's class at Bishop Middle School. The principal of the school, Robert E. Lee, had received the "Guidelines for Civic Occasions" pamphlet from the Assistant Superintendent of Schools, and provided Rabbi Gutterman with a copy of the guidelines. Mr. Lee also spoke to Rabbi Gutterman to advise him that any prayers delivered at the ceremony should be non-sectarian. Rabbi Gutterman was not told that he could not appeal to a deity.

Rabbi Gutterman began his invocation by addressing a deity in the first line of his text, and concluded with "Amen."[2] The benediction similarly opened with an appeal to a God, asked God's blessings, gave thanks to a Lord, and concluded with "Amen."[3] The parties agree that Rabbi Gutterman's invocation and benediction were prayers.[4]

2 Both the invocation and benediction are examples of elegant simplicity, thoughtful content, and sincere citizenship. The full text of Rabbi Gutterman's invocation is as follows:

> God of the Free, Hope of the Brave:
>
> For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.
>
> For the liberty of America, we thank You. May these new graduates grow up to guard it.
>
> For the political process of America in which all its citizens may participate, for its court system where all can seek justice we thank You. May those we honor this morning always turn to it in trust.
>
> For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.
>
> May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.
>
> AMEN

3 The following is the full text of Rabbi Gutterman's benediction:

> O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.
>
> Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them.

Deborah Weisman continues to attend public school in the city of Providence. She is now a freshman at Classical High School in Providence. Plaintiff now seeks a permanent injunction to prevent the inclusion of invocations and benedictions in the form of prayer in the promotion and graduation ceremonies of the Providence public schools. Plaintiff's amended complaint names Principal Lee, the superintendent of Providence public schools, the principal of Classical High School, and the members of the Providence School Committee as defendants.

The parties agree resolution of the case is governed by the first amendment of the United States Constitution, specifically the Establishment Clause.[5] It is to that law that we now turn.

II. THE ESTABLISHMENT CLAUSE

"The [Supreme] Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards v. Aquilard*, 482 U.S. 578, 583-84 (1987). Since the landmark 1962 decision of *Engel v. Vitale*, 370 U.S. 421 (1962), the Supreme Court has steadfastly required that the schoolchildren of America not be compelled, coerced, or subtly pressured to engage in activities whose predominant purpose or effect was to advance one set of religious beliefs over another, or to prefer a set of religious beliefs over no religion at all. God has been ruled out of public education as an instrument of inspiration or consolation.

> The graduates now need strength and guidance for the future. Help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.
>
> We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion.
>
> AMEN

4 Webster's Dictionary defines prayer as "a solemn and humble approach to Divinity in word or thought usu[ally] involving petition, confession, praise or thanksgiving." A benediction is defined as "the invocation of a blessing on persons or things being dedicated to God." An invocation is "a prayer of entreaty that is usu[ally] a call for the divine presence and is offered at the beginning of a meeting or service of worship." Webster's Third New International Dictionary (unabridged), G & L Merriam Co., Springfield, Massachusetts (1981).

5 The first amendment provides in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I.

This vigilance is based upon the perceived sensitive nature of the school environment and the apprehended effect of state-led religious activity on young, impressionable minds. *Grand Rapids School District v. Ball*, 473 U.S. 373, 383 (1985); *Edwards*, 482 U.S. at 584. "Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family." *Edwards*, 482 U.S. at 584.

Under the Establishment Clause, the Court has struck down state statutes that required a daily Bible reading before class (*Abington School District v. Schempp*, 374 U.S. 203 (1963)), or required that a copy of the Ten Commandments be posted in every classroom (*Stone V. Graham*, 449 U.S. 39 (1980)), or required the recitation of a "denominationally neutral" prayer at the beginning of the school day (*Engel v. Vitale*, 370 U.S. 421 (1962)), or statutes which authorized a daily moment of silence expressly for prayer (*Wallace v. Jaffree*, 472 U.S. 38 (1985)). In virtually all of these cases, the Court acknowledged that while "[w]e are a religious people whose institutions presuppose a Supreme Being," (*Zorach v. Clauson*, 343 U.S. 306, 313 (1952)), the Establishment Clause of the first amendment was intended to prevent a State from becoming involved in leading its citizens, however young, in appeals to or adoration of a deity.

The Supreme Court "consistently has applied the three-pronged test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) to determine whether a particular state action violates the Establishment Clause of the Constitution." *Edwards*, 482 U.S. at 597 (Powell, J. concurring); *Grand Rapids School District*, 473 U.S. at 383 (1985) ("We have particularly relied on *Lemon* in every case involving the sensitive relationship between government and

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6 In *Everson v. Board of Education*, 330 U.S. 1 (1947), the Court summarized the Establishment Clause in these oft-repeated words:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations, or groups, and vice versa."

330 U.S. at 15-16.

religion in the education of our children"). An evaluation of the authorized practice of the Providence School Committee under the *Lemon* test is necessary, "mindful of the particular concerns that arise in the context of public elementary and secondary schools." *Edwards*, 482 U.S. at 585.

III. THE *LEMON* TEST

The *Lemon* test reviews governmental actions using three prongs: "First, the [practice] must have a secular . . . purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; [third], the [practice] must not foster 'an excessive entanglement with religion.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (citations omitted). "State action violates the Establishment Clause if it fails to satisfy any of these prongs." *Edwards*, 482 U.S. at 583.

The second prong of the *Lemon* analysis examines whether the effect of the action violates the Establishment Clause. It is here that the invocation and benediction practice runs afoul of the first amendment. Because this Court finds that the Providence School Committee's practice fails to meet constitutional scrutiny under the second prong of the *Lemon* test, it is not necessary to discuss the first and third parts of the test.

The Second *Lemon* Prong: Principal Effect Must Neither Advance Nor Inhibit Religion

One method of determining whether a state action advances or inhibits religion is to determine whether the action creates an identification of the state with a religion, or with religion in general. "Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any — or all — religious denominations as when it attempts to inculcate specific religious doctrines." *Grand Rapids School District*, 473 U.S. at 389.

The particular circumstances of each government action are critical in the examination of the effect that any church-state identification may have on its audience. For example, in *Grand Rapids School District v. Ball*, the Court distinguished between two of its earlier precedents. In *McCollum v. Board of Education*, 333 U.S. 203 (1948), the Court held that religious instruction could not be held on public school premises as a part of the school program, even though the instruction was conducted by non-public school personnel and participation was voluntary. In *Zorach v. Clauson*, however, the Court held that a similar program that was conducted off

school premises passed constitutional scrutiny. 343 U.S. 306 (1952). As the Court explained in *Grand Rapids*, "[t]he difference in symbolic impact helps to explain the difference between the cases. The symbolic connection of church and state in the *McCollum* program presented the students with a graphic symbol of the 'concert or union or dependency' of church and state . . . This very symbolic union was conspicuously absent in the *Zorach* program." *Grand Rapids School District*, 473 U.S. at 391.

Similarly, in *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985), the Court invalidated a "Shared Time" program in which a school district provided classes to nonpublic school students at public expense in classrooms located in and leased from the nonpublic schools. The Court emphasized that students attending both public and nonpublic school classes within the same building "would be unlikely to discern the crucial difference between the religious school classes and the 'public school' classes . . . ." 473 U.S. at 391. The Court pointed out that even the students who were able to recognize the difference between the two classes "would have before [them] a powerful symbol of state endorsement and encouragement of the religious beliefs taught in the same class at some other time during the day." *Id.* at 392.

In this case, the benediction and invocation advance religion by creating an identification of school with a deity, and therefore religion. The invocation and benediction present a "symbolic union" of the state and schools with religion and religious practices. While the fact that graduation is a special occasion distinguishes this school day from all others, the uniqueness of the day could highlight the particular effect that the benediction and invocation may have on the students. The presence of clerics is not by itself determinative. It is the union of prayer, school, and important occasion that creates an identification of religion with the school function. The special nature of the graduation ceremonies underscores the identification that Providence public school students can make.[7] "This effect — the symbolic union of government and religion in one sectarian enterprise — is an impermissible effect under the Establishment Clause." *Id.*

Closely related to the identification analysis is examination which determines whether the effect of the governmental action is to endorse one

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[7] Of course, the reverse might also be true. Students might conclude that a deity is not an important part of their lives. This Court is not permitted to ruminate concerning the aptness of this possible result as the Establishment Clause is currently construed.

religion over another, or to endorse religion in general. The response is a foregone conclusion; that is, the reference to a deity necessarily implicates religion. *See Grand Rapids School District*, 473 U.S. at 389 ("If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated"). In recent cases, the "endorsement" inquiry has come to the fore of *Lemon* analysis. *County of Allegheny v. American Civil Liberties Union*, __U.S.__, 109 S.Ct. 3086, 3100 (1989). Therefore, "an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices. The inquiry into this kind of effect must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years." *Grand Rapids School District*, 473 U.S. at 390. In this case, the Providence School Committee has in effect endorsed religion in general by authorizing an appeal to a deity in public school graduation ceremonies. The invocations and benedictions convey a tacit preference for some religions, or for religion in general over no religion at all. Schoolchildren who are not members of the religions sponsored, or children whose families are non-believers, may feel as though the school and government prefer beliefs other than their own.

It is of no significance that the invocation and benediction are supposed to be nondenominational, or that participation or even recognition of the prayers is voluntary. In *Engel v. Vitale*, 370 U.S. 421 (1962), the Court invalidated a New York statute which required a short, nondenominational prayer to be recited at the beginning of each school day. "Neither the fact that the prayer may be denominationally neutral," the Court wrote, "nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause, of the First Amendment . . . ." 370 U.S. at 430.

In summary, the practice of having a benediction and invocation delivered at public school graduation ceremonies has the effect of advancing religion. The special occasion of graduation coupled with the presence of prayer creates an identification of governmental power with religious practice. Finally, the practice of including prayer may have the effect of either endorsing one religion over others, or of endorsing religion in general.

For these reasons, the practice of providing guidelines for "non-sectarian" prayer fails to withstand constitutional scrutiny.

Defendants rely heavily on *Marsh v. Chambers*, 463 U.S. 783 (1983). In that opinion, the Supreme Court upheld the Nebraska state legislature's opening of each session with a prayer led by a chaplain who was paid by the State. The Court noted that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." 463 U.S. at 786. The Court noted the long history, dating back to the Continental Congress, of opening legislative sessions with a prayer offered by a chaplain who was paid by the state. This unique "unambiguous and unbroken history" led the Court to hold that the drafters of the Constitution did not intend the first amendment to bar such legislative prayers.[8]

Defendant argues that this court should follow the reasoning of the Sixth Circuit Court of Appeals in *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987), in which the court extended *Marsh* to include benediction and invocations at public school commencement ceremonies. In *Stein*, the Court of Appeals held that annual high school graduation exercises were analogous to the legislative and judicial sessions in *Marsh*. The Court of Appeals found that the invocations and benedictions at graduation provided less opportunity for religious indoctrination or peer pressure than did classroom prayer for two reasons: first, the public nature of the ceremonies and the usual presence of parents acted as a buffer from religious coercion; second, the prayers were not led by a teacher or school official, thus they

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8 Like legislative prayer, religious involvement in American education has a long history. Beginning in colonial times, the first schools in this country were religiously motivated. *See generally Lemon v. Kurtzman*, 403 U.S. at 645 (opinion of Brennan, J.) Public school education was not begun until about 1840, nearly seventy years after the Declaration of Independence, and a half century after the adoption of the Constitution. The purpose of colonial schools was to ensure that children could read and understand the principles of Biblical faith. H.G. Good, *A History of American Education*, 40-41 (1975). Many of the charters of America's oldest colleges and universities expressly state that the institutions' purpose was to spread the Christian faith. For example, Dartmouth College was founded to "spread[] Christian knowledge among" American Indians "with a view to their carrying the gospel in their own language." Charter of Dartmouth College, (1769). The point is that at the time the Constitution was adopted, there really was no public education except that intimately connected with religious purpose. There is no factual basis for an historical argument that the first amendment was intended by the drafters to isolate religion from education.

did not implicate the teacher-student relationship. 822 F.2d at 1409. The Court of Appeals did, however, find that the particular benediction and invocation challenged in *Stein* were unacceptable under the *Marsh* holding because they contained language that was based on Christian theology and thus were not nonsectarian. *Id.* at 1410. As the Supreme Court did in *Marsh*, the *Stein* court did not apply the *Lemon* test.[9]

Stein's extension of the *Marsh* rationale is not persuasive. The *Marsh* holding was narrowly limited to the unique situation of legislative prayer. The clearest indication of this fact is that the *Marsh* decision did not use the *Lemon* test in its review of legislative benedictions. Since the *Lemon* test was first developed in 1971, every case involving the issue of prayer in school has used its analysis. *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 ("The *Lemon* test has been applied in all cases since its adoption in 1971, except in *Marsh v. Chambers*"); *Grand Rapids School District v. Ball*, 473 U.S. 373, 383 (1985) ("We have particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children"). *Marsh*'s unique exception to the *Lemon* test would most likely not be applied to school prayer cases, which on the basis of existing precedent requires use of the *Lemon* analysis. When the practice of the Providence School Committee is reviewed under *Lemon*, it fails to withstand Establishment Clause scrutiny, *supra*.

Extending the *Marsh* analysis to school benedictions is arguably unworkable because it results in courts reviewing the content of prayers to judicially approve what are acceptable invocations to a deity. *See Stein*, 822 F.2d at 1410 (reviewing language of invocation and benediction). What must follow is gradual judicial development of what is acceptable public prayer. This result is as contrary to the requirements of the Establishment Clause as is legislative composition of an official state prayer. *See Engel*, 370 U.S. at 425, 430.

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9 The rationale of the *Stein* decision is far from clear precedent. The case was heard by three judges of the sixth circuit, and each judge wrote an opinion in the case. The opinion for the court adopted *Marsh*, did not apply *Lemon*, but found that language of the challenged prayers did not meet *Marsh*'s requirement of nonsectarian prayer. The concurring opinion applied not only the *Marsh* standard, but also applied the *Lemon* test and found that while commencement prayer in general survived *Lemon* scrutiny, the language of the particular prayers in the case did not. The dissenting opinion agreed with much of the two majority opinions, but argued that all commencement prayers passed the *Lemon* test, including those in the *Stein* case.

Finally, the non-sectarian guidelines used by the School Committee are not a means of rescue. They are useful in environments where prayer is permitted. Here, it is not the particular nature or wording of the prayers which implicates the first amendment — it is prayer at the ceremony which transgresses the Establishment Clause.

On every other school day, at every other school function, the Establishment Clause prohibits school-sponsored prayer. If the students cannot be led in prayer on all of those other days, prayer on graduation day is also inappropriate under the doctrine currently embraced by the Supreme Court.

It is necessary to explain what this decision does not do. First, "[n]othing in the United States Constitution as interpreted by this Court . . . prohibits public school children from voluntar[y] [private] pray[er] at any time before, during, or after the school day," or anytime during the graduation ceremonies. *Wallace v. Jaffree*, 472 U.S. 38, 67 (1985) (O'Connor, J. concurring). Second, nothing in this decision prevents a cleric of any denomination or anyone else from giving a secular inspirational message at the opening and closing of the graduation ceremonies. Counsel for plaintiff conceded at argument, as she must, that if Rabbi Gutterman had given the exact same invocation as he delivered at the Bishop Middle School on June 20, 1989 with one change — God would be left out — the Establishment Clause would not be implicated.[10] The plaintiff here is contesting only an invocation or benediction which invokes a deity or praise of a God.

Finally, in the words of Justice Kennedy, "The case before [the court] illustrates better than most that the judicial power is often difficult in its

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10 Rabbi Gutterman could have delivered the following benediction:

> For the legacy of America where diversity is celebrated and the rights of minorities are protected, we are thankful. May these young men and women grow up to enrich it.
>
> For the liberty of America, we are thankful. May these new graduates grow up to guard it.
>
> For the political process of America in which its citizens may participate, for its court system where all can seek justice we are thankful. May those we honor with morning always turn to it in trust.
>
> For the destiny of America we are thankful. May the graduates of Nathan Bishop Middle School so live that they might help to share it.
>
> May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.

exercise . . . The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result." *Texas v. Johnson*, __U.S. __, 109 S.Ct. 2533, 2548 (1989) (Kennedy, J. concurring). The fact is that an unacceptably high number of citizens who are undergoing difficult times in this country are children and young people. School-sponsored prayer might provide hope to sustain them, and principles to guide them in the difficult choices they confront today. But the Constitution as the Supreme Court views it does not permit it. Choices are made in order to protect the interests of all citizens.[11] Unfortunately, in this instance there is no satisfactory middle ground. Neither the legislative, nor the executive, nor the judicial branch may define acceptable prayer. Those who are anti-prayer thus have been deemed the victors. That is the difficult but obligatory choice this Court makes today.

Plaintiff may prepare and present a form of judgment within ten days declaring that the inclusion of prayer in the form of invocations or benedictions at public school promotion or graduation exercises in the City of Providence is unconstitutional in violation of the first amendment and permanently enjoining the School Committee of the City of Providence, its agents or employees from authorizing or encouraging the use of prayer in connection with school graduation or promotion exercises.

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11 Justice Brennan described the effect of the first amendment in his opinion for the Court in *Grand Rapids School District v. Ball*:

> ...For just as religion throughout history has provided spiritual comfort, guidance, and inspiration to many, it can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with particular religions or sects that have from time to time achieved dominance. The solution to this problem adopted by the Framers and consistently recognized by this Court is jealously to guard the right of every individual to worship according to the dictates of conscience while requiring the government to maintain a course of neutrality among religions, and between religion and non-religion. Only in this way can we "make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary" and "sponsor an attitude on the part of government that shows no partiality to any one group and lets each flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

Grand Rapids School District, 473 U.S. at 382.

SO ORDERED,

ENTER:

Francis J. Boyle, Chief Judge
United States District Court
District of Rhode Island

January 9, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

DANIEL WEISMAN, personally
and as next friend
of DEBORAH WEISMAN

v. C.A. No. 89-0377B

ROBERT E. LEE, individually and as principal of THE NATHAN BISHOP MIDDLE SCHOOL; THOMAS MEZZANOTTE, individually and as principal of CLASSICAL HIGH SCHOOL; JOSEPH ALMAGNO, individually and as Superintendent of the Providence School Department; VINCENT McWILLIAMS; ROBERT DeROBBIO; MARY BATASTINI; ALBERT LEPORE; ROOSEVELT BENTON; MARY SMITH; ANTHONY CAPIRO; BRUCE SUNDLUN and ROBERTO GONZALEZ, individually and as members of the Providence School Committee

JUDGMENT

1. The inclusion of prayer in the form of invocations or benedictions at public school promotion or graduation exercises in the City of Providence is unconstitutional in violation of the First Amendment of the United States Constitution.

2. The School Committee of the City of Providence, its agents or employees, are permanently restrained and enjoined from authorizing or encouraging the use of prayer in connection with school graduation or promotion exercises.

SO ORDERED,

ENTER:

FRANCIS J. BOYLE, CHIEF JUDGE
United States District Court
District of Rhode Island

Dated: January 12, 1990

(WEISMAN.ORD)